INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Basis upon which it is contended that the Supreme Court has jurisdiction	1
Statutory provision believed to sustain jurisdiction	3
The statute of the State of Indiana the validity of which is involved	4
Date of judgment or decision	4
Nature of the case and rulings of the court bringing the case within the jurisdictional provisions relied upon	5
Grounds upon which it is contended the questions involved are substantial	6
Stage of proceedings and manner in which federal questions were raised	8
Manner in which question involved were passed upon by court	8
Excerpts from record bringing case within statute conferring jurisdiction on Supreme Court	9
Copy of decision or opinion on rendition of judgment	9
Order denying petition for rehearing	10
Cases believed to sustain jurisdiction	10
Exhibit A.—Opinion of Appellate Court	11
Exhibit B.—Opinion of Supreme Court	19

Table of Cases Cited.

General American Life Insurance Company v. *Carter*, 52 N. E. 2d 509	3
General American Life Insurance Company v. *Carter*, 54 N. E. 2d 944	3
Gregory v. *McBeigh*, 23 Wall. 294, 23 L. Ed. 156	10
Rogers v. *Alabama*, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417	10
Williams v. *Bruffy*, 102 U. S. 248, 26 L. Ed. 135	10

STATUTES CITED.

	Page
Acts of the General Assembly of Indiana (1935), Sec. 229, Chap. 162 (Sec. 39) 4704 Burns' 1940 Replacement Statute approved March 8, 1935, Vol. 9, pp. 218–219	1,2,4
Constitution of the United States, Article 4, Sec. 2	2,7
Constitution of the United States, Fourteenth Amendment	2
Judicial Code, Sec. 237(a); 28 U. S. C. A. 344	2,3

SUPREME COURT OF INDIANA

Cause No. 28000

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Appellant,

vs.

JOSHUA C. CARTER,

Appellee.

STATEMENT OF BASIS OF APPELLATE JURISDICTION AS REQUIRED BY SUPREME COURT RULE NO. 12.

Pursuant to the provisions of Rule #12 of the Supreme Court of the United States, 1939, the above named complainant and appellee filed this, his separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the decision, opinion and judgment appealed from herein as follows:

(a)

Basis upon which it Is Contended that the Supreme Court Has Jurisdiction

The case is one in which the validity of the statute of the State of Indiana, to-wit (Section 229 of Chapter 162 of the acts of the General Assembly of the State of Indiana, which Section begins on page 765 and ends on page 767 of said acts of 1935), which is now Sec. 39-4704 Burns' 1940

Replacement Statute approved March 8, 1935 (Vol. 8 pages 218-219), is drawn in question upon the ground that said statute as the same was construed by the said Supreme Court of Indiana in this case on the 23rd day of May 1944, is repugnant to Section 2, of Article 4 of the United States Constitution and is also repugnant to the 14th Amendment to the United States Constitution. The said final decision of the Supreme Court of the State of Indiana in the court of last resort in all causes in the State of Indiana in which a decision could be had, is in favor of the validity of said statute. The said statute at the time of the commencement of this action, had not expired by its own limitation and was not altered or repealed by law. Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioner herein respectfully shows this Court that the case is one in which under the legislation in force when the act of January 31, 1928, was passed, to-wit, under Sec. 237 (a) of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States.

And likewise, in said cause as appears from the record and proceedings therein and the decision or opinion thereof, there was drawn in question rights arising under the Constitution of the United States, and the decision and opinion in this cause in the Supreme Court of the State of Indiana, such court being the court of last resort of said State, and the decision of said court, being final in this cause, is against and denies such rights and privileges and has in violation of Sec. 2, Article 4 of the Constitution of the United States and also the 14th Amendment to the Constitution of the United States, denied appellant the equal protection of the laws thereby guaranteed to him by said constitutional provisions.

The said Supreme Court in the State of Indiana, the court of last resort in all causes, in the State of Indiana,

rendered its decision or opinion herein on the 23rd day of May, 1944, reversing the judgment in the lower court, to-wit: the Starke Circuit Court, Starke County, Indiana, upon the grounds set forth in the opinion of the said Supreme Court of Indiana. That the said judgment of the Supreme Court of Indiana supersedes the opinion of the Appellate Court of Indiana rendered on the 19th day of January 1944, being this same case *General American Life Insurance Company* v. *Carter* as the same is shown in 52 N. E. 2d 509.

The copy of the opinion of the Appellate Court of Indiana is appended to this statement and identified as Exhibit "A" thereto reference to which is hereby made as fully as if copied herein.

The opinion of the said Supreme Court of Indiana has been reported as, *General American Life Insurance Company* v. *Joshua C. Carter,* in Northeastern Reporter, Second Edition, Vol. 54 at page 944 thereof, a copy of which opinion is appended hereto, and for identification marked Exhibit "B" reference to which is made as fully as if copied herein.

The order reversing the judgment of the aforesaid lower court and directing the said lower court to abate the action herein was entered in the office of the clerk of said court on the 23rd day of May 1944.

(b)

Statutory Provision Believed to Sustain Jurisdiction

The statutory provision believed to sustain the Appellate jurisdiction, is Sec. 237 (a) of the Judicial Code as amended (28 U. S. C. A., Sec. 344).

(c)

The Statute of the State of Indiana the Validity of which Is Involved

The statute of the State of Indiana, the validity of which is involved in Section 39-4704 Burns' 1940 Replacement (more particularly described under (a) of this statement) which reads in part as follows:

> "(h) When a foreign or alien insurance company desires to be permitted to do an insurance business in this State, it shall execute in the English language and present to the department, at its office accompanied by the fees prescribed by law. * * * A duly executed power of attorney in a form prescribed by the department which constitutes and appoints the commissioner of insurance or his successor, or successors, its true and lawful attorney upon whom all lawful processes in any action in law or in equity against it shall be served. Such power of attorney shall contain, an agreement by the insurance company, "that any lawful process against it which may be served upon the Insurance Commissioner as its attorney shall be of the same force and validity as if served upon the insurance company and that such power of attorney shall continue in force and be irrevocable so long as any liability of the insurance company remains outstanding in this state. * * *"
>
> Sec. 39-4704 Burns' 1940 Replacement.

(d)

Date of Judgment or Decision

The date of the opinion or decision sought to be reviewed herein is May 23, 1944, as appears from page — of the printed record containing this statement.

The order denying the allowance of the petition for rehearing from said decision or opinion was made and en-

tered on the 14th day of June 1944, as appears from page — of the printed records containing this statement.

(e)

Nature of the Case and Rulings of the Court Bringing the Case within the Jurisdictional Provisions Relied upon

This is a suit to recover death benefits under a policy of group insurance issued by the defendant appellee General American Life Insurance Company to the appellant's decedent. On the insured's death liability was denied.

Suit was brought on the policy in the Lake Circuit Court, Lake County, Indiana.

The defendant appellee filed plea in abatement denying jurisdiction of its person. By said plea in abatement said defendant, among other things, set up in substance, as follows: (See extracts from defendant's plea in abatement under (i) this statement).

Thereafter defendant took a change of venue from the County and the cause was venued to the Starke Circuit Court, Starke County, Indiana, where plaintiff appellant moved to strike defendant's plea in abatement aforesaid on the ground that the application for change of venue from Lake County constituted a general appearance. This motion was sustained. Defendant then appeared generally, joined issues and a trial was had on the merits resulting in judgment for the plaintiff appellant. The cause was appealed by defendant to the Appellate Court of Indiana, which also held that the plea in abatement was properly stricken and thereafter, upon a petition for rehearing filed by appellee, said Appellate Court upon other grounds transferred said cause to the Supreme Court of Indiana. The Supreme Court of Indiana held that the defendant had not appeared generally and for the first time in the cause the plea in abatement was considered on its merits.

It was substantially admitted by the parties before that court that the following allegations of the plea in abatement and the answer thereto were true:

That the contract of insurance was not an Indiana contract; that plaintiff and his decedent were residents of the State of Mississippi; that the defendant was a Missouri Corporation, not licensed to do business in the State of Mississippi, and had no agent therein upon whom service could be had and that it had refused to submit itself for trial of this action in the State of Mississippi.

Upon these admissions the Supreme Court of Indiana held that service could not be had under the act set out in Paragraph "C" of this statement. Thereupon it reversed the judgment of the lower court and ordered it to enter judgment abating the action. (See opinion of court hereto attached, as Exhibit "B" to this statement.)

Plaintiff, appellee thereupon at his first opportunity, after an adverse ruling on this jurisdictional question against him filed petition for rehearing in the Supreme Court of Indiana by which petition he alleged among other things, that the act set out in paragraph "C" hereof as the same was construed by the Supreme Court of Indiana in its opinion was repugnant to Sec. 2, of Article 4 of the United States Constitution and also repugnant to the 14th Amendment of the United States Constitution.

The said petition for rehearing was denied without an opinion.

(f)

Grounds upon which it Is Contended the Questions Involved Are Substantial

Point 1. That part of the statute of the State of Indiana to-wit, Sec. 39-4704 Burns' 1940 Replacement Statute approved on the 8th day of March 1935, as the same was con-

strued and passed upon by the Supreme Court of the State of Indiana on the 23rd day of May 1944, is unconstitutional and void and repugnant to Sec. 2, of Article 4 of the United States Constitution.

Point 2. That the part of the aforesaid statute of the State of Indiana, as the same is construed by the Supreme Court of Indiana, aforesaid is unconstitutional and repugnant to Sec. 2, of Article 4 of the United States Constitution. And is also repugnant to the 14th Amendment of the United States Constitution. In that it denied the plaintiff therein, appellant herein the equal protection of the laws.

Point 3. The Supreme Court of the State of Indiana erred in ruling that the aforesaid statute of the State of Indiana, denied appellant, a resident citizen of the United States the right to bring suit on his insurance claim in the State of Indiana. The defendant insurance company having been properly served with process in accordance with the aforesaid statute.

In addition to the clauses as stated under (e) in this statement, appellant did, after the decision of the Supreme Court of Indiana, was rendered as aforesaid, file a petition for rehearing, and by his said petition set up, among other things, in substance, as follows: • • •

• • • (Clause 6)

"The court erred in holding in substance that the statute providing for the qualification of Foreign Corporations and their qualification thereunder was designed solely for the purpose of contracts made within the State and also for benefit of resident only, of the State of Indiana, and not plaintiff, a United States citizen, residing in another State."

(Clause 7)

"The court erred in holding that the special legislation concerning service upon insurance companies ex-

cepts them from the provision of other statute affecting foreign corporations doing business in this State."

(Clause 8)

"The court erred, by the language of its opinion as aforesaid, in denying appellee, all of his constitutional rights as provided in the Constitution of the United States, he being a resident citizen of the United States, and more particularly the rights given him under Sec. 2, of Article 4 of the United States Constitution and also the 14th Amendment of the United States Constitution."

(Clause 10)

"The court erred in holding that it was the legislative intent that Sec. 39-4704 Burns' 1940 Replacement Statute, did not permit the bringing of transitory causes of action by non-resident plaintiffs against foreign insurance companies. If such was the legislative intent then the act is unconstitutional as being class legislation, since this court has already held that foreign corporations other than insurance companies may be sued in this state by non-resident plaintiffs on causes of action arising outside of the state. There is no reason why foreign insurance companies may not be thus sued in Indiana while all other foreign corporations may be.

(g)

Stage of Proceedings and Manner in which Federal Questions Were Raised

See Statement under (e), this statement.

(h)

Manner in which Question Involved Were Passed upon by Court

The petition for rehearing by appellee, appellant herein was by the Supreme Court of Indiana denied.

(i)

Excerpts from Record Bringing Case within Statute Conferring Jurisdiction on Supreme Court

1. Grammatical Paragraph 2 of the defendant's plea in abatement which reads as follows:

> "• • • 2. That the only service had in this case on this defendant was by the service of summons on the Commissioner of Insurance of the State of Indiana, the statutory agent appointed by this defendant for service of process upon it under the Acts of 1883, Chapter 97, Burns' R. S. 1933, Sec. 39-1707; (now Sec. 39-4704 Burns' Indiana 1940 Replacement Statute) that said statutory requirement is exacted of this defendant and other foreign insurance companies for the protection of citizens of the State of Indiana and the assurance to them of the opportunity to bring and maintain actions against such foreign insurance companies in the courts of this state, on account of business transacted therein; that said statute was not designed nor intended to permit, nor does it permit, the suing of a foreign insurance company in the State of Indiana by a non-resident of the State on a contract or other obligations arising wholly outside of the State of Indiana."

2. See the opinion of the Supreme Court of Indiana made Exhibit "B" attached to this statement.

3. Clauses 6 through 10 of appellant's petition for rehearing as shown under "f" of this statement.

(j)

Copy of Decision or Opinion on Rendition of Judgment

The decision or opinion of the Supreme Court of Indiana rendering judgment herein on the 23rd day of May, 1944, is appended to this statement and identified as Exhibit "B"

reference to which is hereby made as fully as if copied at this place in this statement.

(k)

The Order of the Court Denying Appellant's Petition for Rehearing Reads as Follows:

"Denied the petition for rehearing in the above-entitled appeal."

This order was entered on the 14th day of June 1944, as shown at page — of the printed record, containing this statement.

(l)

Cases Believed to Sustain Jurisdiction

Rogers *v.* Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417;

Williams *v.* Bruffy, 102 U. S. 248, 255, 26 L. Ed. 135-137;

Gregory *v.* McBeigh, 23 Wall. 294, 306, 23 L. Ed. 156, 157.

Respectfully submitted,

(Signed) Z. Dallas Hicks,
Anderson, Hicks & Anderson,
By (Signed) F. Laurence Anderson,
Reed & Reed,
By —— ——,

Attorneys for Appellant.

EXHIBIT "A"

IN THE APPELLATE COURT, NOVEMBER TERM, 1943.

On the 19th day of January, 1944, being the 51st Judicial day of said November Term, 1943.

No. 17151.

Hon. Harry L. Crumpacker, Chief Judge.

Hon. Wilbur A. Royse, P. J., Hon. Dan C. Flanagan, Hon. Paul F. Dowell, Hon. Floyd S. Draper, Hon. Edgar M. Blessing, Associate Judges.

IN THE CASE OF GENERAL AMERICAN LIFE INSURANCE COMPANY, A CORP., *Appellant*,

vs.

JOSHUA C. CARTER.

APPEALED FROM THE STARKE CIRCUIT COURT.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Dowell, J.

Appellant is a Missouri insurance Corporation having its principal offices in the City of St. Louis. Appellee and appellee's decedent were, at the time of trial in the court below and the happening of the events out of which the lawsuit arose, residents of the State of Mississippi. Appellant had no officer or agent in Mississippi for the service of process, not having been authorized to do business in that state. It was, however, authorized to do business in the State of Indiana and process issuing on plaintiff's complaint in the trial court was served on the Commissioner of Insurance of the State of Indiana pursuant to the statute. The action in the court below did not involve real estate or other subject matter having its situs in the State of Indiana. There has been in existence for some years, an organization known as the Federal-Postal Employees Association of Denver, Colorado, whose business,

as it appears by the record, is that of soliciting memberships by mail and by personal solicitation by other members, the advantage of membership being, solely, the ability to purchase life insurance under the group insurance plan at reduced rates. Applications for this type of insurance are received by the Association and placed with a life insurance company, which issues a certificate entitling the holder thereof to the benefit in a stated principal sum of a group life insurance policy previously issued and covering the lives of insured members of the association. Appellant's predecessor insurance companies originally carried this group policy and it was assumed by appellant after the insolvency of the predecessors. Appellee's decedent made application for insurance in the amount of $3000.00 as a member of the Association on an old form issued when appellant's predecessor was carrying said policy. The application, however, was received by the Association and the insurance applied for was issued by the appellant and its insurance certificate was forwarded to appellee's decedent. Appellee decedent died March 20, 1938. Payment of the amount of the principal sum was refused by appellant and appellee brought this action as beneficiary to recover same.

The complaint was filed in the Lake Circuit Court and summons issued thereon to the Commissioner of Insurance. Appellant, thereupon, filed in the same court his motion to set aside the service and to dismiss the cause, which motion was by that court denied, whereupon appellant filed a plea of abatement to which appellee filed notice of intention to file a motion to strike same from the files. Appellant filed a motion for change of venue of the entire cause from Lake County and the cause was sent to Jasper County, Indiana, where a similar motion was filed by the appellee with the result that the venue finally rested in Starke County, Indiana. In the last mentioned county and in the circuit court thereof appellee filed his motion to strike appellant's plea of abatement from the files. Appellant countered by a petition for an order to reopen the issues by withdrawing the plea of abatement and to reconsider and re-submit the motion to dismiss and tendered the

motion to set aside the service and to dismiss previously ruled upon by the Lake Circuit Court. The Starke Circuit Court then overruled appellee's motion to strike appellant's plea of abatement from the files and also appellant's last mentioned motion whereupon appellee again filed his motion to strike, which was by the court sustained and the plea of abatement stricken. Appellant then filed again a motion to dismiss which was overruled. Appellant answered the complaint and the cause went to trial upon the complaint, answers and replies.

Trial was by jury resulting in a verdict for appellee in the sum of $3780 with judgment accordingly.

Appellant assigns as error (a) the action of the Lake Circuit Court in overruling appellant's motion to set aside the service and dismiss the cause, (b) the action of the Starke Circuit Court in denying the petition to reopen the issue and re-submit the motion to dismiss, (c) the overruling of the motion to dismiss the cause, (d) the striking out of the plea of abatement, (e) the overruling of appellant's motion to strike certain paragraphs of appellee's reply, and (f) the overruling of appellant's motion for a new trial.

With regard to appellant's assignment hereinabove noted as (a) the appellant has not pointed out any defect appearing upon the face of the record. The return of the Sheriff shows service upon the Insurance Commissioner of Indiana. If he was not the proper party to receive service on behalf of the appellant, that was a question of fact to be determined by the court upon a proper plea.

> Workingmen's Mut. etc., Assn. *v.* Swanson (1908), 43 Ind. App. 379, 87 N. E. 668.

Assignments b, c and d relate to motions and pleadings questioning the propriety of entertaining in the courts of Indiana the appellee's cause of action. They cannot be construed otherwise than attacks upon the jurisdiction though in this respect they are indirectly stated. This being true, appellant's position with respect thereto is untenable. Appellant admitted the jurisdiction by his motion

for a change of venue of the entire cause from Lake County and cannot now complain.

Princeton Coal etc., Co. *v.* Gilchrist (1912) 51 Ind. App. 216, 99 N. E. 426;
Hassler *v.* Shaw (1925), 271 U. S. 900, 70 L. Ed. 195.

Appellant's fifth assignment, i.e., the court erred in overruling the motion to strike is not available error.

Rooker *v.* Fidelity Trust Co. (1921), 191 Ind. 141, 131 N. E. 769.

The motion for a new trial contains 37 specifications including those which challenge the sufficiency of the evidence and the legality of the verdict.

The evidence, though highly conflicting, and interwoven with unexplained discrepancies and intimations of forged documents is sufficient to sustain the verdict. While it is susceptible of being resolved favorably to the appellant and though another result might have been reached, still we have not the right to weigh it to determine where the preponderance lies nor to determine whether portions thereof are true or false. The right to do this was exclusively the jury's.

Considered in that light most favorable to the appellee, it discloses that on August 11, 1937, one Robert E. Lee, a county agent, in Brandon, Mississippi, talked with appellee's decedent about becoming a member of the Association, he himself being a member and as such having received with a notice of insurance premium due a blank application form which he had been requested to give to a person of his acquaintance with a view to obtaining such person as a new member. There is evidence to the effect that for some years previous he had received such blank application forms with each notice of insurance premium and had several such in his possession. Appellee's decedent filled out the form, signed it and mailed same together with the application for insurance and the requisite advance fee or payment to the Federal-Postal Employees Association at Denver, Colorado. The application was received in the Denver office on October 15, 1937, and on the same day its application for the insurance coverage was made to the

appellant which accepted it, and on October 19, 1937, issued to appellee's decedent an undated insurance certificate which she received shortly afterward. On August 28, 1937, appellee's decedent was taken to a physician and it was then discovered that she was afflicted with diabetes mellitus, this last mentioned date being only seventeen days after the date of application for insurance. Appellee's decedent did not then notify either appellant or the Association of the discovery of her affliction nor did she ever do so. On March 20, 1938, appellee's decedent died, the cause of death being certified as pellagra with contributory neuro-psychosis. Notice of death was made and given by appellee in due form and after considerable investigation appellant refused payment.

Appellant insists that appellee's right of recovery is barred because of his decedent's failure to give notice of the change of her physical condition of which she received knowledge after making application for insurance and before the issuance of the certificate. It is to be noted in this regard that neither the insurance certificate nor the group insurance policy under which it issued contained any provision that the insured should be in good health at the time of delivery thereof. No representations as to physical condition or health were requested except in the application wherein applicant was asked whether or not she had consulted a physician at any time within the past three years, and whether applicant knew of any impairment presently existing in her health or physical condition. Appellee's decedent answered both queries in the negative and so far as the record goes, the truth of these answers is unchallenged. Nor did appellant or the Association require at any time a physical or medical examination by a physician.

Under such circumstances appellant's contention is not supported by the weight of authority. Such facts constituted a valid defense to the action only and did not bar the right of recovery. *Stipcich* v. *Ins. Co.* (1928), 277 U. S. S. 311; *Mutual Benefits Insurance Co.* v. *Higginbotham* (1877), 95 U. S. 380; *New York Life Insurance Co. v. Moats* (1913), 207 F. 481.

Appellant predicates error upon the action of the court below in giving to the jury plaintiff's instructions numbered 1, 11, 12 and 13 and in its refusal to give defendant's tendered instruction numbered 8. All of these instructions bore upon appellee's right of recovery under the circumstances of her failure to disclose the change in her physical condition, the plaintiff's instructions informing the jury that such circumstances of themselves would not bar recovery and the defendant's that they would. In the light of our conclusions hereinbefore stated on the subject we perceive no error here. Appellant also contends that the court in giving the plaintiff's instruction numbered 10, used the word "she" thereby alluding to appellee's decedent's right to recover instead of appellee and that the instruction was misleading and erroneous for that reason. Appellant's cited authorities do not bear him out and we cannot believe that such a slight impropriety could have been harmful or misleading under the circumstances.

Error is assigned upon the refusal of the trial court to admit, over objection, answers of appellee who was a witness in his own behalf, to certain questions propounded by appellant which, it is contended, were designed to lay the foundation for impeachment. In the one instance the witness was handed a photostatic copy of a document which was not then in evidence and concerning which the witness had not testified nor made any assertions during his examination in chief. Upon cross-examination, without preliminary inquiry for the purpose of eliciting answers which, if false or contrary to statements previously made elsewhere, thus laying the predicate for the impeaching question, the witness was asked whether or not he had made certain statements in a prior trial of the same cause. To afford a ground for the type of impeachment contemplated here by appellant there must have been contradiction between statements alleged to have been made elsewhere and those made on the witness stand. The testimony was properly excluded under the circumstances. *Blough et al.* v. *Parry et al.* (1895), 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. Moreover, the excluded testimony was later introduced without objection from the lips of another of ap-

pellant's witnesses who was the court reporter on the former trial of the cause.

Appellant predicated error upon the admission in evidence of plaintiff's exhibit No. 11, which was a carbon copy of a letter written by appellee's decedent to the Association on October 11, 1937, at the request of one Ethel Kincade to which letter was attached a money order for fifty cents, the letter being a request that said Kincade's application for membership be considered and accepted. Appellant objected to the admission on the ground that the exhibit was a carbon copy, that there had been no attempt to produce the original and on the further ground that appellant insurance company was not bound by "anything they sent to somebody else." The document in question was offered and admitted on plaintiff's rebuttal after appellant, in its case in chief for the defense, had introduced evidence of the transaction, involving the money order with the post-mistress of Piney Woods, Mississippi. The evidence was properly admitted. *Ellinger* v. *Rawlings et al.* (1894), 12 Ind. App. 336, 40 N. E. 146. See also *The Noblesville and Eagletown Gravel Road Company* v. *Gause* (1881), 76 Ind. 142. Nor did the fact that the document was a carbon copy affect its admissibility. Carbon copies, properly identified, of a written instrument are regarded as duplicate originals and may be introduced in evidence without accounting for any other impression of the writing. *Massachusetts, etc., Ins. Co.* v. *State ex rel.* (1925), 82 Ind. App. 377, 149 N. E. 377.

Appellant also assails the ruling of the trial court in striking from the deposition of one Dr. F. D. Patterson, President of Tuskegee Institute, the following matter:

> Question: "So far as the records of your institution show, is the signature written on each of these cards after the printed word 'student' the signature of Gertrude Carter of Piney Woods, Mississippi?"
> Answer. "Yes."

The witness had not previously testified that he was familiar with the handwriting of appellee's decedent, nor that he saw her sign the exhibits, nor had he previously been qualified as an expert for the purpose of comparing

these signatures with the known handwriting of appellee's decedent. The matter was properly excluded. *Plymouth Saving, etc. Assn.* v. *Kassing, Admr.* (1919), 72 Ind. App. 1, 125 N. E. 488.

It is finally contended that the trial court erred in rejecting certain testimony of physicians concerning the case history of appellee's decedent during her treatment for diabetes mellitus. The fact that she had the disease, that it was discovered on August 28, 1937, that her condition soon became serious, that it could have been in existence and probably was prior to August 11, 1937, that after she discovered her condition she received treatment from at least three physicians and had been a patient at an infirmary was established by the testimony of others including the physicians themselves. The records of the infirmary where she received treatment were admitted in evidence as was also the testimony of the custodian of these records. Under such circumstances the action of the court, if erroneous, was harmless.

Affirmed.

It is unnecessary to pass upon the cross errors assigned by the appellee.

EXHIBIT "B"

THE STATE OF INDIANA, IN THE SUPREME COURT, MAY TERM, 1944.

On the 23rd day of May, 1944, being the 2nd Judicial day of said May Term, 1944.

No. 28000.

Hon. Michael L. Fansler, Chief Justice.
Hon. Curtis G. Shake, Hon. Mart J. O'Malley, Hon. Frank N. Richman, Hon. H. Nathan Swaim, Associate Judges.

IN THE CASE OF GENERAL AMERICAN LIFE INSURANCE COMPANY, A CORPORATION,

vs.

JOSHUA C. CARTER.

APPEALED FROM THE STARKE CIRCUIT COURT.

Transferred from Appellate Court under Sec. 4-209, Burns' 1933.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Fansler, J.

This is an action prosecuted by the appellee as beneficiary of an insurance policy upon the life of his deceased sister against the appellant, a Missouri corporation, having its principal office in the City of St. Louis. The appellant is authorized to do business in the State of Indiana, and summons was served upon the Commissioner of Insurance, under section 39-4704, Burns' 1940 Replacement, Section 9509-4, Baldwin's Supp. 1935. The action does not involve real estate or personal property having a situs within the state, but is purely *in personam*. The defendant (appellant) appeared specially and filed a motion to set aside the service and dismiss the cause for want of jurisdiction of the person. This motion was denied, and the defendant

thereupon filed a verified plea in abatement covering substantially the same subject-matter. The defendant requested a jury trial upon its plea in abatement, and immediately thereafter filed a verified motion for a change of venue from the county, which was granted, and the cause was venued to Jasper County. The plaintiff then filed a verified motion for a change of venue, and the cause was venued to Starke County. In the Starke Circuit Court the defendant's plea in abatement was stricken out, upon the ground that defendant's motion for a change of venue from the Lake Circuit Court constituted a general appearance and a waiver of the jurisdictional question. The appellant has assigned this ruling as error.

Answers in abatement raise issues of law or of fact just as such issues are raised by answers in bar. The plaintiff may demur to an answer in abatement, or reply. If the facts stated are sufficient and are denied, an issue of fact is raised. Section 2-1034, Burns' 1933, Section 138, Baldwin's 1934, provides in part: "An answer in abatement must precede, and can not be pleaded with, an answer in bar, and the issue thereon must be tried first and separately. If the issue be found against the answer, the judgment must be that the party plead over, and against him for all costs of the action up to that time." At common law issues of fact raised by such a plea were triable by jury, and that has always been and is the practice here. Under the modern practice, a change of venue from the county may be taken before the cause is at issue, as was done in this instance. The change of venue statute was designed to provide unbiased triers, and no reason has been pointed out, nor do we see any reason, why it does not apply to issues of fact raised by an answer in abatement as well as to issues raised by an answer in bar. It follows that by seeking a jury trial and a change of venue from the County, the defendant was merely pursuing his remedy by abatement.

The appellee has cited Princeton Coal & Mining Co., et al *v.* Gilchrist et al (1912), 51 Ind. App. 216, 99 N. E. 426, as supporting the ruling of the trial court. In that case two of several defendants joined in a plea in abatement. Which questioned the court's jurisdiction of their

persons. Pending a ruling, one of these two defendant-, "for and on behalf of the defendant," filed a motion for a change of venue from the county, which was sustained. It was insisted that this motion for a change amounted to a full appearance and a waiver of the matter in abatement. The court said (page 220 of 51 Ind. App. page 427 of 99 N. E.): "Whether the filing of a motion for a change of venue constitutes a full appearance, has never been directly decided by the courts of this State. The rule seems to be that where a motion goes to the merits of the action, the same must be made on full appearance. A motion for a change of venue, while not strictly affecting the merits of the action, necessarily recognizes the jurisdiction of the court over the persons who join in the motion and invokes the aid of the court in that behalf. The filing of such a motion has been held to be an admission jurisdiction. Feedler *v.* Schroeder (1875), 59 Mo. 364; Baisley *v.* Baisley (1893), 113 Mo. 544, 21 S. W. 29, 35 Am. St. 728." The court in which the motion for a change of venue was filed has jurisdiction of the subject-matter of the action, and jurisdiction to determine whether or not it had jurisdiction of the person. Of course, a motion for a change of venue invokes the aid of the court in that behalf, but so does the filing of a plea in abatement, and when an answer in abatement is pending it is difficult to see how it can be logically said that a motion for a change of venue invokes the jurisdiction of the court to do more than transfer the venue so that the court of an adjoining county may exercise jurisdiction to determine whether or not jurisdiction of the person has been acquired. We notice, however, that the motion for a change of venue considered was "for and on behalf of the defendant." It has long been held that a motion for a change of venue by one defendant speaks for all defendants, and the venue is changed as to al-, and, since this language was quoted in the opinion, it may have influenced the result reached. The Missouri cases cited as supporting the ruling are of doubtful value. The first case involved an action before a justice of the peace. The defendant was served, and on the return day applied for a change of venue, which was granted. On the day set for trial

before the new justice there was a judgment by default. A motion to set aside this judgment was overruled, and the defendant appealed to the circuit court and there filed a motion to quash the return for want of jurisdiction, which was overruled, and the defendant having failed to appear further the judgment of the justice was affirmed. The case came to the Supreme Court by writ of error. It was held that his application for a change of venue was a full appearance, and that his subsequent motion to quash the return came too late. In the second case the defendant appeared specially for the purpose of questioning the jurisdiction of his person. His plea was heard and there was a finding against him and judgment was entered accordingly, to which action the defendant excepted. After the adverse ruling the defendant filed an application for a change of venue, which was granted. Thereafter the defendant filed an answer renewing his plea to the jurisdiction of the court on grounds similar to those already adjudicated, and also answered on the merits. It was held that the judgment upon the issues joined on the jurisdicational question was a bar to a further litigation of that question; that if he was dissatisfied he should have asked for a new trial and reserved exceptions and appealed; that when the case reached the court to which the venue had been changed the question of jurisdiction was "*res judicata*". This clearly decided the question, but the court went further following the argument of counsel, and said that even if the question had not been adjudicated, the motion for a change of venue was such an appearance as waived proper service of process and admitted the jurisdiction of the court over the person of the defendant. Feedler *v.* Schroeder (1875), 59 Mo. 364, *supra,* is cited as supporting this dictum.

It is clear that the issues raised by an answer in abatement may be submitted to a jury. We see no reason, and find no authority, for distinguishing such an issue of fact from any other issue of fact in respect to the right of a party to have disinterested triers. In Eel River R. Co. et al. *v.* State ex rel. Kistler, etc., (1900), 155 Ind. 433, 57 N. E. 388, the Eel River Railroad Co., one of the defendants, appeared specially and answered in abatement, denying

the jurisdiction of the court over its person. There was a reply, putting the question at issue. At this stage the Eel River Railroad Co. applied for a change of venue, which was granted. The Wabash Railroad Co. also filed an answer in abatement. It was held that the answer in abatement of the Wabash Railroad Co. came too late, since it had previously appeared to the merits. Able and distinguished counsel represented both sides, and numerous questions were vigorously presented, but no suggestion seems to have been made that upon seeking a change of venue upon the issue made upon its answer in abatement the Eel River Railroad Co. had waived the question and appeared to the merits. Nor can it be seen how such a contention can logically be made. The same principle seems to be involved in the rule that the procuring of a removal of a cause from a state to a federal court does not waive the right to question jurisdiction of the person. Morris & Co., et al. *v.* Skandinavia Insurance Co. (1929), 279 U. S. 405, 49 St. Ct. 360, 73 L. Ed. 762.

The Court erred in striking out the answer in abatement, and this requires a reversal of the judgment.

It appears, however, that the substantial facts relied upon in one paragraph of the answer in abatement are not in dispute. The contentions of the parties in the light of those facts have been fully presented, and it seems obvious that a failure to pass upon them now will invite another appeal.

The facts are that the appellant, a Missouri corporation with its principal office and place of business in the State of Missouri, was authorized to do business in the State of Indiana, and that it had complied with Section 39-4705, Burns' 1940 Replacement, section 9509-4, Baldwin's Supp. 1935, *supra,* by executing and delivering a power of attorney authorizing service upon the Commissioner of Insurance as its attorney-in-fact; that the plaintiff was at all times involved a resident of the State of Mississippi, and that his deceased sister, the insured in the policy sued upon, was and always had been a resident of the State of Mississippi; that the defendant had no agent in the State of Mississippi for service of process; that the action does not involve real estate or personal property and seeks merely a personal

judgment; that the contract was made through an organization known as the Federal-Postal Employees Association of Denver, Colorado, by mail, the application having been mailed from Mississippi to Denver, and thence to the defendant in St. Louis, Missouri. It is the appellant's contention that the statute requiring insurance companies to designate the Commissioner of Insurance to act as their agent for the service of process is designed to aid residents of the State of Indiana or those whose transactions with the insurance company occurred in this state, and is not designed to permit the bringing of a transitory action by a nonresident who never lived in Indiana against a foreign insurance company on a transaction occurring in some other jurisdiction. The statute referred to provides that the power of attorney permitting service upon the Insurance Commissioner "shall continue in force and be irrevocable so long as any liability of the Insurance Company remains outstanding in this state." In Morris & Co. et al. *v.* Skandinavia Insurance Co., *supra,* which involved substantially the same question, the court said that there is no jurisdiction within the state unless the insurance company's authorization in respect to service is broad enough to extend jurisdiction; that the importation of such controversies would not serve any interest of the state; that (pages 408, 409 of 279 U. S., pages 361 of 49 S. Ct., pages 766 of 73 L. Ed.) "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the State. (Authorities.) The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains outstanding in Mississippi. * * * And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the State the duty, or to give them power to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained." The Supreme Court of Missouri, in State ex rel American Central Life Insur-

ance Co. *v.* Landwehr, Circuit Judge (1927), 318 Mo. 181, 300 S. W. 294, overruling former cases, held that a statute providing for service upon a foreign insurance company doing business in the state, "so long as it shall have any policies or liabilities outstanding in this state," confined the right of service under the power of attorney to actions based upon "policies or liabilities outstanding in this state."

The execution of the power of attorney in conformity to the statute constitutes a contract by which the insurance company agreed to be bound, and this contract cannot be construed to include cases beyond the purview of the agreement and the intent of the parties. It must be assumed that the statute was enacted with the purpose of serving some interest of the state or its inhabitants. There could be no possible interest in the importation of actions entered into in other jurisdictions between the insurance company and non residents of the state. It is reasonable to conclude that the intent and design was to bring the insurance company within the jurisdiction of the courts of the state for the purpose of actions arising out of contracts made within the state or with residents of the state. Since this seems the obvious purpose of the statute, it "ought not to be construed to impose upon the courts of the State the duty, or to give them power to take cases arising out of transactions so foreign to its interests." The special legislation concerning service upon insurance companies excepts them from the provisions of other statutes affecting foreign corporations doing business in the State. Rehm et al. *v.* German Ins. & Savs. Institution of Quincy (1890) 125 Ind. 135, 25 N. E. 173. Dodgem Corporation *v.* D. D. Murphy Shows, Inc. (1933), 96 Ind. App. 325, 183 N. E. 699, and Globe Accident Insurance Co. *v.* Reid (1898), 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291, cited by appellee, are not in point.

In view of our conclusions, it is unnecessary to consider the assignment of cross-errors.

Judgment reversed, with instructions to enter a judgment that the action abate.